FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

May 2, 2016

The Honorable John Thune
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Thune:

Thank you for your letter regarding disclosure of non-public information outside the Commission. Answers to your specific questions are attached. I appreciate you reaching out to me and please let me know if I can be of further assistance.

Sincerely,

Tom Wheeler

1. **You stated in your April 4, 2016 response that, "consistent with the rules, it has been the agency's practice for many years to rely on authorizations from the Chairman (or his staff, acting on his behalf) when disclosure would be in the interest of the agency." Provide a list of every authorization you or your employees acting on your behalf have made of disclosures of nonpublic information from October 29, 2013 to the date of this letter.**

As I explained in my response of April 4, 2016, authorizations to disclose nonpublic information do not have to be written, except in the situation described in paragraph (b) of Commission rule 19.735-203, where an FCC employee would like to use nonpublic information in outside teaching, lecturing, or writing. As I stated in my April 4 response, I have not provided such a written authorization since I have been FCC Chairman. My office does not keep a list of the disclosures for which written authorization is not required.

While the FCC has an obligation to protect sensitive information and our deliberative process, we also have a responsibility to be open and transparent about our activities. As a general matter, the FCC may choose to release nonpublic information when we think it will promote the discussion and understanding of important policy issues, but do no harm to our internal decision making. Described below are examples of situations in which the Office of the Chairman has decided that disclosure would be in the interest of the agency:

- When it is necessary to coordinate our activities with other Federal agencies or non-Federal law enforcement authorities;
- When the FCC consults with outside experts on mergers and other matters;
- When the FCC briefs Members of Congress and their staffs about draft agenda items or circulates pending before the Commission;
- When the FCC Commissioners or staff provide high-level summary information in speeches, blogs, fact sheets, or press briefings about agenda items pending before the Commission that are of significant public interest; and
- When the FCC publicly releases information about the Commission's internal operations in order to foster a conversation about FCC process reform.

2. **To clarify the source of your authority you cited in your April 4, 2016 response, please indicate to which specific rules you were referring in your response when you stated that the agency's practice of relying on authorizations from the Chairman or his staff to permit disclosure of nonpublic information was "consistent with the rules." If no such rules exist, please provide documentation showing the approval of such disclosures by a majority of Commissioners.**

Section 5(a) of the Communications Act of 1934 (the Act) makes the Chairman the "chief executive officer of the Commission."[1] One of the responsibilities of the chairman is "generally to coordinate and organize the work of the Commission in such manner as to promote prompt

[1] 47 U.S.C. § 155(a).

and efficient disposition of all matters within the jurisdiction of the Commission."[2] Based on this statutory authority, the Commission has delegated to the Chairman "the responsibility for the general administration of internal affairs of the Commission."[3] In practice, this means that the Chairman is responsible for the day-to-day management of the Commission. In this supervisory, executive role, I take many actions every day to make sure that the agency operates efficiently and furthers the goals of the Act.[4] Authorizing the release of nonpublic information when it would be in the interest of the agency is one of the many administrative tasks I and past FCC chairs have performed pursuant to this delegated authority.

3. **Shortly after the first postponement of the open meeting held on March 31, 2016, nonpublic information about the fact that Republican commissioners had reached an agreement with Commissioner Clyburn on a "cap" for the Lifeline program was disclosed to *Politico*, which published an article based on the disclosure at 10:47 a.m.**
    a. **Did you or any other Commission employee disclose or authorize disclosure of nonpublic information relating to these negotiations or the Commission's deliberations on the Lifeline order to Politico, any other media outlet, or any other person not employed by the Commission?**
    b. **If so, provide the legal justification, for doing so.**
    c. **If not, does the Commission plan to investigate who leaked information about the deliberations, pursuant to the Commission rules. If not, why not?**

Like other high-profile agenda items the Commission has considered, the draft Lifeline order I presented for consideration to my fellow Commissioners in early March was the subject of intense discussion and debate both inside and outside of the agency. This interest is understandable given that Lifeline is a program that impacts 40 million low-income Americans.

The press reports you cite make it clear that information about the Commissioners' deliberations was shared outside of the FCC. It is already a matter of public record that Commissioner Pai and his staff disclosed information about the Commissioners' deliberations both before and after the open meeting on March 31, 2016. As I discuss in my response to Question 5 below, how and when nonpublic information about the Lifeline order was shared outside of the FCC is now the subject of an investigation by the FCC Inspector General. I intend to fully cooperate with this investigation and look forward to its findings.

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[2] *Id.*

[3] 47 CFR § 0.211.

[4] Designating one member of a multi-member independent agency as the agency's chief executive is a common practice and is viewed as promoting the efficient operation of an agency. *See, e.g., The Independent Regulatory Commissions: A Report to Congress by the Commission on Organization of the Executive Branch of the Government ("Hoover Commission Report")* at 5 (1949). ("Administration by a plural executive is universally regarded as inefficient. This has proved to be true in connection with these commissions. Indeed, those cases where administration has been distinctly superior are cases where the administrative as distinguished from the regulatory duties have been vested in the chairman. There are many of these administrative duties. Their efficient handling will frequently make the difference between a commission's keeping abreast of its work or falling woefully behind.")

4. **The disclosure of nonpublic information in the 10:47 a.m. *Politico* article appeared designed to engage outside interest groups to disrupt the deal struck between the Republican Commissioners and Commissioner Clyburn. The Sunshine rules require FCC employees to terminate any discussion with someone who may be making a prohibited *ex parte* presentation and then to forward information about any such improper contact to the Commission's Office of General Counsel (OGC) (47 C.F.R. § 1.1212). Indeed, anyone failing to report such information may be subject to sanction (47 C.F.R. §1.1216).**
    a. **Has any FCC employee forwarded information regarding prohibited *ex parte* discussions to OGC in relation to the March 31 open meeting?**

A review of filings in the docket of the Lifeline proceeding (WC Docket No. 11-42) shows that Commission officials received a number of *ex parte* presentations during the Sunshine Agenda period preceding the open meeting on March 31, 2016. Because these presentations were made by Members of Congress or their staffs and a Federal Government agency, they were exempt from the Sunshine period prohibition on *ex parte* presentations under Section 1.1203(4) of the Commission's rules.

The Office of General Counsel received one report of a violation of the Sunshine period *ex parte* prohibition related to the Lifeline proceeding, but this alleged violation is unrelated to the events about which you express concerns in your letter.

I expect that the Inspector General's investigation of the events surrounding the March 31 open meeting (see my response to Question 5 below) will include an examination of whether any prohibited presentations occurred. I intend to fully cooperate with this investigation and look forward to its findings.

5. **Have you notified the Inspector General of any potential misconduct in relation to the March 31, 2016 open meeting as required by Commission rules?**

As you discuss in the final paragraph of your April 15 letter, under section 19.735-107(b) of the Commission's rules, your letter constitutes a misconduct complaint that the Commission must promptly investigate. Pursuant to section 19.735-107(c) of the Commission's rules, the Office of the Inspector General has chosen to conduct this investigation. The FCC notified your Committee staff of this fact on April 21, 2016. I intend to fully cooperate with this investigation and look forward to its findings.